the main grant, it would seem, *a fortiori*, to be true that, even though such a limitation as the one in the submission of the Eighteenth Amendment is void, the whole submission does not fall therewith.

COURTS—PENDENCY OF ANOTHER ACTION—ABATEMENT AND REVIVAL.—Plaintiff brought an action in the county court for injuries to his automobile, sustained in a collision with the defendant's automobile. Defendant later sued plaintiff in the municipal court for damages sustained in the same collision, and judgment for defendant was rendered in the suit in the municipal court. Plaintiff filed a bill to restrain the further prosecution of the suit in the municipal court on the ground that the county court had acquired jurisdiction first. *Held*, the two suits not being for the same cause of action, the bill should be dismissed. *Gilley* v. *Jarvis* (Vt., 1920), 109 Atl. 41.

The view taken by the court in this case is undoubtedly correct. For a discussion of this question and contrary decisions, see *supra*, 18 MICH. L. REV. 421.

DAMAGES—BREACH OF COVENANT OF SEISIN.—The grantee of land entered into a contract for the sale of it; the purchaser from the grantee repudiated the contract and obtained judgment for an advance payment and costs on the ground that the title was not marketable. The grantors of the land were notified, but refeused to defend the suit. In an action against the grantor for breach of the covenant of seisin it was *held* that the grantors are liable to the grantee for the difference between the total purchase price and the value of the portion of the land to which they had title with interest. As the suit with the purchaser was not in defense of the title, no damages could be recovered in respect to it. *Hilliker* v. *Rueger* (New York, 1920), 126 N. E. Rep. 266.

The rule in England for failure to convey realty is to allow nominal damages merely. *Flureau* v. *Thornhill*, 2 W. B. 1078; *Bain* v. *Fothergill*, 7 H. L. Cas. 158. But in the United States the rule is generally the difference between the value of the realty at the time of conveyance and the contract price. *Hopkins* v. *Lee*, 6 Wheat. 109; *Doherty* v. *Dolin*, 65 Me. 87; *Plummer* v. *Regdon*, 78 Ill. 222. *Contra*, see *Hammond* v. *Hannen*, 21 Mich. 374; *Burk* v. *Scrull*, 80 Pa. 413; *Pumpelly* v. *Phelps;* 40 N. Y. 59; *Margraf* v. *Muir*, 57 N. Y. 155. On general principles, the measure of damages would be fixed by the bargain—*i. e.*, in case of eviction the value of the property lost. Under a covenant of seisin the value would be taken at the time of the conveyance, for it is then the breach occurs. Under the covenant of quiet enjoyment and warranty the value would be taken at the time of actual eviction. But owing to the extreme hardship which would result to a remote grantor the rule has been adopted that in breach of covenants of seisin and warranty the damages are the consideration paid, with interest and reasonable costs of defending the title. *Staats* v. *Ten Eycks* (N. Y.), 3 Cain. 111; *Pitcher* v. *Lewingston* (N. Y.), 4 Johns. 1. See cases cited in TIFFANY ON REAL PROPERTY, Chap. XIX, note 301. Under the ancient *warrantia chartae* the value of the land at the time of conveyance, rather than the consideration paid, was recovered. In a few states the covenant of warranty is consid-

ered a covenant to indemnify and the value at the time of eviction may be recovered. *Horsford* v. *Wright* (Conn.), Kirby 3; *Gore* v. *Brazier,* 3 Mass. 523; *Cecconi* v. *Rodden,* 147 Mass. 164; *Park* v. *Bates,* 12 Vt. 381; *Williamson* v. *Williamson,* 71 Me. 442. When the seisin of part of the property fails the damages are the purchase price, and interest, of the part which fails. The damages will bear the same proportion to the whole purchase money that the value of the part to which the title failed bears to the value of the whole premises. *Phillips* v. *Reichart,* 17 Ind. 120; *Norton* v. *Norton,* 10 Conn. 422; *Bibb* v. *Freeman,* 59 Ala. 612; *Weber* v. *Anderson,* 73 Ill. 439; *Wright* v. *Nipple,* 92 Ind. 310; *Scantlin* v. *Allison,* 12 Kans. 85; *Cornell* v. *Jackson* (Mass.), 3 Cush. 506; *Adkins* v. *Tomlinson,* 121 Mo. 487; *Beaupland* v. *McKeen,* 28 Pa. St. 124; *Partridge* v. *Hatch,* 18 N. H. 494. It is submitted that the damages awarded in the principal case are on no logical basis; neither a proportionate part of the consideration nor a proportionate part of the value at the time of conveyance. The rule is properly stated in *Partridge* v. *Hatch, supra,* viz.: "If the title fail to part of the land conveyed the grantee may recover a sum bearing the ratio to the whole purchase money with interest, that the value of such part of the land bears to the whole conveyed."

DAMAGES—MITIGATION—BREACH OF CONTRACT.—"A contract for the sale of goods by the defendant to the plaintiff provided that delivery should be required during a period of nine months, and that payment should be made for each installment within one month of delivery, less 2½ per cent discount." "The plaintiffs failed to make punctual payment for the first installment, and the defendant * * * refused to deliver any more of the goods under the contract, but offered to deliver the goods at the contract price if the plaintiffs would agree to pay cash at the time of the orders." *Held,* "what is reasonable for a person to do in mitigation of his damages cannot be a question of law, but must be one of fact in the circumstances of each particular case." *Payzu, Ld.,* v. *Saunders* (C. A.) [1919], 2 K. B. 581.

This pronouncement from an authoritative source is refreshing. It means that we have no magic word by the utterance of which we can settle these cases, but that in every instance we must satisfy some fairly sensible men—a jury—that the plaintiff has done what reasonably might have been expected of him under all the circumstances to reduce the amount of damages. In the case of *Lawrence* v. *Porter* (1894), 63 Fed. 62, 11 C. C. A. 27, it was held that the offer to sell for cash and not for credit must be accepted because it was an offer in "mitigation." In the case of *Whitmarsh* v. *Littlefield* (1887), 46 Hun. 418, it was held that a cash offer of a less sum instead of the first cash offer of a greater sum need not be accepted because it was an offer in "substitution." This court also said that the second proposition was one to "abandon the old contract," and therefore it would result in a "waiver" or any rights under it. In a later federal case on a state of facts similar to those in *Lawrence* v. *Porter, supra,* the court decided that this case was not a precedent because the second offer was "conditional" rather than "unconditional." *Campfield* v. *Sauer* (1911), 189 Fed. 576. On the